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No. 75-370

UNITED STATES OF AMERICA
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975

GUS JOHN SKARTSIVAS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
CITATIONS OF AUTHORITY.....	i
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION INVOLVED.....	2
STATUTE INVOLVED.....	2
QUESTIONS PRESENTED.....	3
STATEMENT OF THE CASE.....	4
ARGUMENTS	
I. PETITIONER WAS ENTRAPPED AS A MATTER OF LAW BECAUSE, PRIOR TO AFFORDING PETITIONER THE OPPORTUNITY TO COMMIT THAT CRIME, THE GOVERNMENT AGENTS, ON THE BASIS OF THEIR UNDISPUTED TESTIMONY AT TRIAL, POSSESSED NO FACTS ON WHICH THEY COULD FORM A REASONABLE BELIEF THAT PETITIONER WOULD COMMIT THAT CRIME.....	14
II. WHERE THE TESTIMONY OF AN INFORMANT AT A PRIOR TRIAL WAS LARGELY EXCULPATORY OF PETITIONER, THE GOVERNMENT HAD AN OBLIGATION, AS A MATTER OF DUE PROCESS, TO CALL THAT INFORMER UPON RETRIAL OF PETITIONER AND NOT REQUIRE PETITIONER TO CALL HIM IN ORDER TO MAKE OUT HIS DEFENSE.....	28
CONCLUSION.....	52
EXHIBIT A.....	53
EXHIBIT B.....	54

CITATIONS OF AUTHORITY

	Page
Brady v Maryland, 373 U.S. 83 (1968).....	36, 49
Giglio v United States, 405 U.S. 150 (1972).....	36
Henderson v United States, 216 F.2d 909 (5th Cir. 1959).....	14, 26
Kadis v United States, 373 F.2d 370 (1st Cir. 1967).....	15
Little v United States, 490 F.2d 686 (8th Cir. 1974).....	29, 50
Lopez v United States, 373 U.S. 427 (1963).....	38, 39, 46
Lunsford v United States, 200 F.2d 237 (10th Cir. 1953).....	15
Morales v United States, 260 F.2d 439 (6th Cir. 1958).....	15, 25, 26
Morei v United States, 127 F.2d 827 (6th Cir. 1942).....	14, 20, 25, 26
On Lee v United States, 343 U.S. 747 (1952).....	38
Sherman v United States, 356 U.S. 369 (1958).....	17, 18, 26, 27, 37, 40

	Page
Sorrells v United States, 287 U.S. 435 (1932).....	18, 19, 20
United States v Bryant, 461 F.2d 416 (6th Cir. 1972).....	28, 36, 40, 42, 47, 49
United States v Clarke, 200 F.Supp. 905 (E.D.Pa. 1963).....	49, 50
United States v Costner, 359 F.2d 969 (6th Cir. 1966).....	39, 44
United States v Craig, 477 F.2d 129 (6th Cir. 1973).....	28, 51
United States v Curry, 284 F.Supp. 458 (N.D. Ill. 1968).....	50
United States v DeVore, 423 F.2d 1069 (4th Cir. 1970).....	15
United States v Fancutt, 491 F.2d 312 (10th Cir. 1974).....	50
United States v Fox, 437 F.2d 733 (7th Cir. 1971), certiorari denied, sub nom. Gill v United States, 402 U.S. 1011 (1971).....	15
United States v Hampton, 507 F.2d 832, certiorari granted, No. 5822, January 10, 1975.....	16
United States v Key, 371 F.2d 421 (6th Cir. 1967).....	28

	Page
United States v McGrath, 468 F.2d 1027 (7th Cir. 1972) vacated on other grounds, 412 U.S. 986 (1973).....	20
United States v Owens, 228 F.Supp. 300 (D.D.C. 1964).....	15, 26
United States v Ramsey, 220 F.Supp. 86 (E.D. Tenn. 1963).....	28, 37, 38, 44, 50
United States v Russell, 411 U.S. 423 (1973).....	16
United States v Walton, 411 F.2d 283 (9th Cir. 1969).....	29, 36, 49
United States v White, 324 F.2d 814 (2d Cir. 1963).....	51
United States v Williams, 488 F.2d 788 (10th Cir. 1973).....	15, 20, 49
United States v Williams, 487 F.2d 210 (9th Cir. 1973), certiorari denied 416 U.S. 958 (1974).....	29, 51
Whiting v United States, 296 F.2d 512, 519 (1st Cir. 1961).....	21

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GUS JOHN SKARTSIVAS,

Petitioner

vs. No.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. A copy of same is attached hereto as Appendix A.

JURISDICTION

1. The opinion of the United States Court of Appeals for the Sixth Circuit was

rendered on June 30, 1975.

2. An order Extending the Time Within which to File the Petition for Writ of Certiorari was entered on July 28, 1975 by Mr. Justice Marshall extending the time to file to and including August 15, 1975.

3. Jurisdiction of this Court is predicated on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

In pertinent part Article V provides:

No person....shall be deprived of life, liberty, or property without due process of law....

STATUTE INVOLVED

In pertinent part, 21 U.S.C. 841(a) provides:

Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute,

or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

QUESTIONS PRESENTED

I.

WHETHER PETITIONER WAS ENTRAPPED AS A MATTER OF LAW BECAUSE, ACCORDING TO THE UNDISPUTED TESTIMONY OF GOVERNMENT AGENTS, THEY POSSESSED NO REASONABLE GROUND(S) TO BELIEVE PETITIONER WOULD SELL OR POSSESS NARCOTICS BEFORE INITIALLY AFFORDING HIM THE OPPORTUNITY TO DO SO.

II.

WHETHER THE GOVERNMENT WAS REQUIRED UNDER THE DUE PROCESS CLAUSE AND UNITED STATES v BRYANT, 461 F.2d 742 (6th Cir. 1973), TO CALL AS A GOVERNMENT WITNESS AN INFORMANT WHOM, ON THE BASIS OF HIS PRIOR TESTIMONY, IT KNEW, OR OUGHT REASONABLY TO HAVE KNOWN, WOULD GIVE TESTIMONY EXCULPATORY OF PETITIONER.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Eastern District of Michigan, after a trial by jury, on two counts of possession and sale of heroin in violation of 21 U.S.C. 841(a)(1).* On October 22, 1974, Petitioner was sentenced to five years' imprisonment on each count, the sentences to run concurrently, plus a special three year parole term.

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* The trial from which the appeal below was taken was Petitioner's third trial. Petitioner's plea of guilty was withdrawn after he asserted that a witness could corroborate his claim of coercion by the government informant. The first trial resulted in a verdict of guilty on both counts. The trial court ordered a new trial principally on the basis of the inadequacy of prior counsel. The second trial ended in a mistrial when the jury was unable to reach a verdict.

The evidence adduced at trial, which is pertinent to issues hereafter raised, disclosed the following.

(a) <u>The Investigation</u>

In early or mid-September, Agent Frank Catalogna, of the Drug Enforcement Administration, began an investigation utilizing an informant, Frankie Mays. Mays was to attempt to arrange for Petitioner to sell narcotics to an undercover agent (Tr. 86-87, 148).** Agent Catalogna testified that he had known

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** "Tr." denotes the transcript of the trial below; "T.Tr." denotes the transcript (Exhibit 6) of taped recordings (Exhibit 5) introduced in this case; the court reporter did not include in the trial transcript the playing of the tapes (see Tr. 28-29); "F.M.Tr." denotes the transcript of Frankie Mays' testimony at the second trial; "R." denotes the record below. The Clerk of the Court of Appeals has been requested to certify the record to the Clerk of this Court. See letter, Appendix B.

Mays only since early or mid-September and that he had been introduced to him by Secret Service Agents who indicated Mays wanted to cooperate (Tr. 147-148). Mays provided Agent Catalogna with some telephone numbers (Tr. 87, 95) after which Agent Catalogna surveilled the houses at which the phones were listed. The agents, after jotting down license plate numbers of vehicles at a house, discovered one belonged to Petitioner (Tr. 95). Mays was then shown a picture of Petitioner, whom Mays knew as Mike, and was asked to tell Petitioner he had a customer who was willing to buy narcotics (Tr. 95, 110).

On cross-examination it was disclosed that neither Agent Catalogna, who had general supervision over Mays, or Agent Smith, who was the undercover agent in this case, had

ever seen or heard Petitioner deal in narcotics prior to September 26, 1972, the date of the first sale charged in the indictment (Tr. 44, 142). Agent Catalogna further testified that he possessed no personal knowledge of Petitioner's involvement in narcotics (Tr. 142-143). Agent Smith had never worked with Mays before and knew very little about him (Tr. 46).

Mays was paid $300 for his work on Petitioner's case (Tr. 146) and a total of $3,800 from August, 1972 to March, 1973 for work on 6 cases and for information supplied (Tr. 144-147). The "case fee" was apparently dependent on Mays putting a narcotics dealer in contact with a government agent to negotiate a sale (Tr. 145).

(b) September 26, 1972 Sale

Agent Catalogna arranged with Mays to have Petitioner call Mays on September 26, 1972 to arrange a sale (Tr. 11). Petitioner called while Agent Smith (or "Dog" as he was known in his undercover capacity) was at Mays' home to set the amount (1 ounce), the price ($1,000), and the meeting place (Six Mile and Wyoming) for the transaction (Tr. 12-13). Under surveillance by Agent Catalogna, Dog and Mays went to the meeting place. Petitioner got in the car, transmitted a tin foil package, identified as Exhibit 1, to Dog, who in turn gave Petitioner $1,000 (Tr. 15-17, 19, 88-89).

According to Agent Smith, Petitioner offered a heavy quarter of heroin to Dog for $200, explaining that another customer didn't want it; Dog purchased the tin foil wrapped package, identified as Exhibit 2,

for $200 (Tr. 18-19). Dog inquired whether Petitioner could sell additional quantities. Petitioner replied that he could be contacted through Mays (Tr. 20).

A field test and a later chemical analysis disclosed that Exhibits 1 and 2 contained heroin in a strength of 4% (Tr. 19-20, 43-44).

(c) October 4, 1972 Sale

It was decided to attempt another purchase without using the informer Mays, in order to protect the informer, as well as to insure that the transaction was not set up by the informer "in underhanded ways" (Tr. 63-66, 77-78).

Dog called Petitioner directly on October 4, 1972 and recorded the ensuing five conversations (Tr. 25-28). Agent Smith identified himself to Petitioner as "Frankie's

Boy, Dog" (Tr. 23; T.Tr. 1, 2). Petitioner asked if Dog could "handle" two "O's", meaning whether he would buy 2 ounces of heroin (Tr. 30; T.Tr. 2). Petitioner inquired if Dog could bring him the "bread", meaning money, first (Tr. 32; T.Tr. 2). Agent Smith admitted, however, that Petitioner did not use the usual narcotics phrase "front the bread" and that "bread" is a common slang term for money (Tr. 56-57). Petitioner responded to Dog's inquiry regarding the price of "two sportcoats" (according to Agent Smith a phrase to disguise talk about heroin), (Tr. 36) that it would cost "19½" meaning $1,950. Dog responded, "about 19", meaning $1,900; Petitioner would not accept an $1,800 price offered by Dog (Tr. 36-38; T.Tr. 4-5). When

Dog complained about the quality of the narcotics sold previously, Petitioner indicated he would try to do better and that he was doing the best he could (Tr. 35; T.Tr. 35). The remainder of the conversations dealt with the time and place of the meeting (T.Tr. 5-7).

In the late afternoon on October 4, 1972, Dog, surveilled by Agent Catalogna, met Petitioner at the appointed place and time (Tr. 39, 91). Petitioner got in Dog's car and gave him a plastic bag with a white substance, identified as Exhibit 3, and Dog gave him $1,900 (Tr. 40). Dog's attempt to reach Petitioner's source was rebuffed by Petitioner (Tr. 41). Petitioner stated, according to Agent Smith, that he could contact him by telephone if he needed more narcotics (Tr. 41). A field test and a later

chemical analysis confirmed that Exhibit 3 was heroin of 3% strength (Tr. 42, 43-44).

(d) Motion for Judgment of Acquittal; Instructions

At the conclusion of the government's case, motion for judgment of acquittal was made. It was based on the undisputed facts disclosing that the government agents had no basis for a reasonable belief that, prior to September 26, 1972, Petitioner would sell narcotics if simply afforded an opportunity to do so. It was argued that, under the decisions of the Sixth Circuit, and other circuits, Petitioner was entitled to acquittal as a matter of law (Tr. 153-180). The trial court denied the motion (Tr. 181).

The defense also requested an entrapment instruction tailored to the existence or absence of the government agents' reason-

able belief that Petitioner would commit a narcotics offense if merely afforded the opportunity to do so (Tr. 183-189, 193-195). However, the trial court denied the request (Tr. 195) and gave its standard entrapment instruction (Tr. 201-203, 214-215) to which objection was made (Tr. 221).

ARGUMENT

I.

PETITIONER WAS ENTRAPPED AS A MATTER OF LAW BECAUSE, PRIOR AFFORDING PETITIONER THE OPPORTUNITY TO COMMIT THAT CRIME, THE GOVERNMENT AGENTS, ON THE BASIS OF THEIR UNDISPUTED TESTIMONY AT TRIAL, POSSESSED NO FACTS ON WHICH THEY COULD FORM A REASONABLE BELIEF THAT PETITIONER WOULD COMMIT THAT CRIME

The evidentiary record at trial is clear. Government agents possessed absolutely no grounds upon which they could form a reasonable suspicion, much less a reasonable belief, that Petitioner would commit the crime charged if merely afforded the opportunity to do so.

This Court has not had occasion to consider this issue. The Circuit Courts of Appeal are divided upon this issue. See e.g. Henderson v United States, 261 F.2d 909, 912 (5th Cir. 1959); Morei v United States 127

F.2d 827, 833-834 (6th Cir. 1942); Morales v United States, 260 F.2d 939 (6th Cir. 1958); United States v Fox, 437 F.2d 733, 735 (7th Cir. 1971), cert. denied sub nom, Gill v United States, 402 U.S. 1011 (1971); United States v Owens, 228 F.Supp. 300, 303-304 (D.D.C. 1964); Lunsford v United States, 200 F.2d 237, 239 (10th Cir. 1953); for circuits in which the "reasonable suspicion rule" is applied. Compare e.g. Kadis v United States, 373 F.2d 370, 373 (1st Cir. 1967); United States v DeVore, 423 F.2d 1069 (4th Cir. 1970); United States v Williams, 487 F.2d 210, 211 (9th Cir. 1973); cert. denied 416 U.S. 958 (1974) for circuits in which the "reasonable suspicion rule" has been rejected.

This Court has evidenced a desire to

clarify the law in the area of entrapment. United States v Russell, 411 U.S. 423 (1973); United States v Hampton, 507 F.2d 832 (8th Cir. 1974) cert. granted, No. 74-5822, January 10, 1975. This case presents a further clear opportunity to do so. In the area of entrapment, the issue presented here constitutes a threshold question - a question which, in many entrapment cases, chronologically and conceptually should be resolved before the trial court can consider the issues determined in Russell and which are before this Court in Hampton.

Jurisprudentially, and as a matter of sound public policy, the "reasonable suspicion" rule is sound. Surely nothing enunciated in Russell, supra, appears to have been intended to grant to the government carte blanche to solicit the commission of crime from every

citizen, or any citizen, who happens to walk down the street. As was stated in Sherman v United States, 356 U.S. 364, 372 (1958), whose philosophy and holding Russell reaffirmed, the government may seek to ensnare the "unwary criminal" but is prohibited from seeking to entrap the "unwary innocent."

Perhaps one must return to the opinion in Sorrells, (whose philosophy and holding was also reaffirmed in Russell), in which the underpinnings for the entrapment defense were first set forth, in order to fully comprehend the limitations placed on the government. Chief Justice Hughes opined:

> We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise

> innocent in order to lure them to its commission and to punish them. Sorrells, supra at 448. (Emphasis supplied). See also Sherman, supra at 372.

The key to the quotation is this Court's prohibition against seeking to lure "otherwise innocent persons" into committing crime. If the Court meant only that the determination, as to whether or not one was innocent, was to be made at the precise point in time at which the inducement was actually offered, then the above quotation would be as worthless in protecting innocent citizens as a warning written on tidal sands.

Manifestly, Chief Justice Hughes was declaring that congressional policy would be subverted and perverted if government officials could approach persons whom - prior to approaching them - it did not reasonably believe or suspect would commit crime when offered the opportunity to do so. This Court

must keep in mind that the purpose of allowing the government to utilize inducement as an artifice or stratagem is to seek out and catch those "engaged in criminal enterprises". Sorrells v United States, 287 U.S. 435, 441 (1932). (Emphasis supplied).

The government would argue to this Court that the determination whether a defendant was "engaged in criminal enterprises" is a restrospective one. In other words, if a citizen succumbs to the government's inducement that citizen, ipso facto, is, or has been, engaged in a criminal enterprise. The fact that the citizen committed the crime, the government would argue, is determinative of the citizen's predisposition to commit the crime if offered an opportunity to do so.

Clear thinking opinions have rejected

this bootstrap argument. To argue that "predisposition existed because the citizen in fact committed the crime" begs the question. See Sixth Circuit's perceptive commentary on this point in Morei v United States, 127 F.2d 827, 834-835 (6th Cir. 1942); see also United States v McGrath, 468 F.2d 1027, 1029 (7th Cir. 1972), vacated on other grounds, 412 U.S. 936 (1973). To accept the government's position would be to virtually emasculate the defense of entrapment and would cause the doors to be opened to the subversion of congressional policy against which the Sorrells Court warned.*

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* The Ninth Circuit's statement, in Williams, supra 487 F.2d at 211, that the "reasonable suspicion rule" would not add to the protection afforded the innocent misses the jurisprudential point and becomes bogged down in conceptual mire of its own making. Its frame of reference for "innocence" is whether the person afforded the opportunity accepted or rejected it.

Unless the government is required to possess information on which it can base a reasonable belief or suspicion that a citizen is "not otherwise innocent" but "is engaged in criminal enterprises" before attempting to induce that citizen to commit a specific type of crime, how is the government going to know that it is approaching only those engaging in illegal activities. Unless such a requirement continues to be imposed, the judiciary will be countenancing mere governmental "surmise(s) from the shadows - a guess in the dark" (Compare Whiting v United States, 296 F.2d 512, 519 (1st Cir. 1961)) regarding a citizen's propensity to commit the proffered crime.

The determination whether the government has sought to induce an innocent person to commit crime must initially focus on informa-

tion possessed by the government prior to approaching a citizen. If the government satisfies the "reasonable suspicion" test then, of course, it may offer the opportunity to commit the crime and, at trial, it may seek to show actual predisposition to overcome the entrapment defense by adducing evidence arising from the transaction itself. But, the government must establish, in effect, that it "knew what it was doing" before seeking to induce commission of a crime.

To hold otherwise would be to permit the government to approach anyone, at anytime, anywhere to attempt to effectuate a criminal act. Such a notion is repugnant to American jurisprudence.

This case affords ample justification for the existence and application of the "reasonable suspicion" rule. The evidence

at trial disclosed that prior to the date of the first sale neither Agent Catalogna, the agent-in-charge, nor Agent Smith had met Petitioner. Neither agent had overheard Petitioner deal in, or discuss, narcotics. Neither agent had seen Petitioner deal in narcotics. The only information possessed (if it can be called that) was Agent Catalogna's testimony that he saw a car, which he later identified as belonging to Petitioner, at a house. It was not even testified to that Petitioner was in the car. Nor does the evidence disclose that there was anything improper or illegal about Petitioner's car being at that house or that known illegal activities were conducted there (Tr. 44, 46, 87, 95, 110, 142).

That is the sum total of information possessed until the actual sale was made on

September 26, 1972. It is important to also keep in mind that Agent Catalogna had known the informant Mays only for a short while before September 26, 1972 - at the longest, less than a month, at the shortest, a little over a week (Tr. 147-148). Agent Catalogna had not had an opportunity to work in a close relationship with Mays. More importantly, Mays himself had apparently just begun such informant work (Tr. 147-148). Agent Smith had never worked with Mays and knew very little about him (Tr. 46). Thus, the "information" received might not even possess any substantial degree of reliability.

It is submitted, therefore, that the evidence disclosed the government possessed no information on which it could base a reasonable belief that Petitioner had been, or was, engaged in the narcotics traffic. The

evidence also disclosed, therefore, that the government possessed no information on which to base a belief that Petitioner would succumb to an offer to sell narcotics.

A comparison of the facts, or more properly, the absence of facts, in Petitioner's case, to the facts, or absence of facts, in previously-cited cases in which the courts have found entrapment as a matter of law on the basis of the "reasonable suspicion" rule warrants a finding that here, likewise, there was no evidence sufficient to support a "reasonable suspicion" that Petitioner would sell narcotics.

Here as in Morei v United States, 127 F.2d 827, 834 (6th Cir. 1942) and in Morales v United States, 260 F.2d 939, 940 (6th Cir. 1958), Petitioner had no criminal record associated with narcotics. Here, as in Sherman,

supra at 375, as in Morales, supra at 940, as in Morei, supra at 834, and as in United States v Owens, 228 F.Supp. 300, 304 (D.D.C. 1964), there was no evidence that Petitioner had been, or was, engaged in narcotics traffic. Here, as in Owens, supra at 304, there was no evidence that Petitioner had been seen trafficking in narcotics. Here, as in Sherman, supra at 375, and as in Henderson v United States, 261 F.2d 909, 912 (5th Cir. 1959), no drugs were found in Petitioner's personal possession, in his car, or in his home after his arrest. Here, as in Sherman, supra at 375, as in Henderson, supra at 912, and as in Owens, supra at 304, there was no substantial evidence that Petitioner made any profit from sales involved herein.

On the basis of these factors it is "patently clear" (Sherman, supra at 375) that Petitioner was induced to commit the first

crime charged in the indictment on September 26, 1972, at a time when the inducing government agents possessed no reasonable grounds for belief that he would commit the crime.* Such action constitutes entrapment. That conclusion requires reversal with a remand directing entry of a judgment of acquittal.

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* To the extent the government would argue that, regardless of the first sale, they had reasonable grounds to believe Petitioner would sell narcotics on October 4, 1972, Sherman would reject such a notion. The second sale was not an "independent act", but "part of a course of conduct which was the product of the inducement." Sherman, supra at 374.

II.

WHERE THE TESTIMONY OF AN INFORMANT AT A PRIOR TRIAL WAS LARGELY EXCULPATORY OF PETITIONER, THE GOVERNMENT HAD AN OBLIGATION, AS A MATTER OF DUE PROCESS, TO CALL THAT INFORMER UPON RETRIAL OF PETITIONER AND NOT REQUIRE PETITIONER TO CALL HIM IN ORDER TO MAKE OUT HIS DEFENSE

While it is conceded that the general rule does not require the government to call an informer as a witness (e.g. United States v Craig, 477 F.2d 129, 131 (6th Cir. 1973); United States v Key, 371 F.2d 421, 423 (6th Cir. 1967), there is a well-recognized exception thereto, constitutionally mandated by the due process clause of the Fifth Amendment. Where the informer's testimony would be exculpatory, the government must call the informer. See e.g. United States v Bryant, 461 F.2d 416, 419 (6th Cir. 1972); United States v

Ramsey, 220 F.Supp. 86 (E.D. Tenn. 1963); see generally, United States v Walton, 411 F.2d 283, 287-289 (9th Cir. 1969); Little v United States, 490 F.2d 686, 686-687 (8th Cir. 1974); United States v Williams, 488 F.2d 788, 790 (10th Cir. 1973). It is to this exception that the following argument is addressed.

A few observations crucial to consideration of this issue must be stated at the outset. First, the nature and extent of the informer Mays' testimony was known at the time the motion to call Mays as a government witness was made. Mays had testified at length at a prior trial which ended in a mistrial because the jury was deadlocked. Secondly, the testimony was, perused as a whole, exculpatory in nature as the recitation below will indicate. Third, a summary of the pertinent testimony adduced through Mays at the second trial

is necessary to show the knowledge possessed by the government when it refused to call Mays and it is also necessary to illustrate the information possessed by the trial court when it denied Petitioner's motion to have the government call Mays (Tr. 141).*

Mays' testimony may be broken down into two categories: that relative to (a) coercion and (b) predisposition.

(a) Coercion

Mays related that he threatened people all the time; that he roughed people up or had "enforcers" rough people up; that he held

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* No extensive argument was made, as the record reflects, because a prior motion had been denied after briefing and argument.

himself out as a "rough customer", "one not to be dealt lightly with"; that this was the way he conducted business (F.M.Tr. 22-25).

Mays specifically recalled a direct and clear threat against Petitioner either between the first and second sales charged in the indictment or, more probably, following the second sale (F.M.Tr. 56-58, 106-111). When asked by counsel for Petitioner whether he had directly and clearly threatened Petitioner prior to the sales charged in the indictment in order to induce him to make the sales, Mays replied it was possible; he wouldn't deny it, but just could not specifically recall (F.M.Tr. 38-39). He did admit that he "put fear in" Petitioner, but not with a gun, but with gestures and the type of conversation employed, which is the way he "always did business"

(F.M.Tr. 38-39, 119-120). Further testimony disclosed that he always "told" Petitioner what to do; he never "asked" him to do anything (F.M.Tr. 8-11, 12, 40-41, 42, 48-49, 50-51).

Mays admitted being motivated to make cases for the government by obtaining leniency on a then-pending charge (F.M.Tr. 18) and by obtaining remuneration, $3,895 total (F.M.Tr. 19), $300 for this case (F.M.Tr. 54). Mays also "demanded" (F.M.Tr. 96) that Petitioner give him some money after consummation of the transactions charged in the indictment as well as a quantity of narcotics for his use; Petitioner complied (F.M.Tr. 12, 40-41, 53-54, 115). Mays admitted concealing receipt of the money and the drugs, as well as his initial transaction with Petitioner, from his superiors (F.M.Tr. 39, 51, 91) as he knew he was not supposed to do such things. Mays also

knew that he was not authorized to threaten anyone (F.M.Tr. 84).

(b) Predisposition

Mays characterized Petitioner as "absolutely stupid" about narcotics transactions (F.M.Tr. 59), and in the street jargon of Mays' trade, "square as a pool table and twice as green" (F.M.Tr. 60). In support of these characterizations Mays related that Petitioner's packaging of the narcotics (tin foil rather than plastic or cellophane) was unusual for the amount of narcotics involved (F.M.Tr. 36, 89). The drugs supplied by Petitioner were described as "mixed jive", "very, very low form" (F.M.Tr. 114-115), "not very good" (F.M.Tr. 88), "lousy junk" (F.M.Tr. 115) and finally "something I couldn't sell and live" (F.M.Tr. 88). Selling bad quality

drugs could, Mays testified, create an unhealthy situation for the seller if a refund was not made by the seller (F.M.Tr. 9).

Mays termed "very unusual" Petitioner's providing him with a "quarter" of heroin, worth $200-$250 when he told him he only wanted a "half quarter" and only paid Petitioner $100, the "half quarter" price (F.M.Tr. 37, 72). "Highly irregular" was Petitioner's sale of 2 "quarters" to Agent Smith on September 26, 1972 for $200 when on the same day, shortly before, he had sold 5 "quarters" for $1,000; Mays also characterized this transaction as "doesn't sound like anything normal" (F.M. Tr. 5-6).

Petitioner was "very nervous" compared to his manner when selling clothes (F.M.Tr. 46) and "much more nervous" than persons dealing in narcotics and "frightened"

(F.M.Tr. 47). Petitioner did not (or could not) follow directions regarding preparation of the narcotics (F.M.Tr. 73). Mays "told" or "demanded" Petitioner to do the things which he did in connection with the September and October sales charged in the indictment (F.M.Tr. 10-11, 39-43, 50-51). Petitioner "didn't know what (Mays) was talking about" when he asked for a sample (F.M.Tr. 32).

Importantly, prior to "telling" Petitioner to get him some drugs, Mays had never known or heard of Petitioner selling drugs (F.M.Tr. 29) and had never discussed Petitioner with anyone else in relation to Petitioner selling drugs (F.M.Tr. 30). When first introduced to the informant Petitioner was not identified as a drug seller (F.M.Tr. 31). Even after being "told" to procure drugs on one occasion by Mays, Petitioner did not have them (F.M.Tr. 36).

Fair play demands that the government may not withhold the black sheep whose difficult-to-control machinations generated the sales of which Petitioner stands convicted, "irrespective of the good or bad faith of the prosecution." Brady v Maryland, 373 U.S. 83, 87 (1963); Giglio v United States, 405 U.S. 150, 153 (1972).

As the Sixth Circuit has recognized in United States v Bryant, 461 F.2d 912, 916 (6th Cir. 1972):

> 'The government is not ordinarily compelled to call all witnesses competent to testify including special agents or informers.' United States v. Mosby, 422 F.2d 72, 74 (8th Cir.), cert. denied, 399 U.S. 914, 90 S.Ct. 2217, 26 L.Ed. 2d 571 (1970). Nevertheless, there are situations when the Government, as a matter of due process, is required to call a witness who the Government has reason to believe will give exculpatory testimony. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1968); United States

> v. Walton, 411 F.2d 283, 288 (9th Cir. 1969). (Emphasis supplied).

This is not an ordinary case. This is a situation where the government knowingly possessed information which, objectively viewed, would, or should,have given it a reasonable belief Mays' testimony would have been exculpatory. Mays, a special agent or informer, was legally an agent of the United States government which cannot disown his actions. Sherman v United States, 356 U.S. 369, 373-374 (1958).

In an extremely cogent opinion, Judge Neese, in United States v Ramsey, 220 F.Supp. 86, 90 (E.D. Tenn. 1963), squarely held that, under the circumstances of that case, the government informer was required to be called as a witness by the government.

The opinion relied heavily upon the Supreme Court's discussion of the nature and role of an informer in Lopez v United States, 373 U.S. 427 (1963) and in On Lee v United States, 343 U.S. 747 (1952). Ramsey, supra at 87-89.

As Judge Neese penetratingly perceived, the crux of Ramsey's defense -- and the crux of most accused's entrapment defense -- was not what occurred between himself and the ATTD agents at the time of the transactions charged in the indictment per se. The crux was the relationship between the informant, French, and Ramsey before and leading up to the events charged in the indictment: what appeals were made to induce Ramsey into the commission of the crime.

The sole reason for the demand and motion that the government call Mays was so that Mays could testify regarding his dealings

with Petitioner and any threats made against Petitioner. Where an informer is utilized to set up the transaction which gives rise to the indictment there is always the possibility that the informant will overstep appropriate bounds. The government simply cannot always control actions by informants who are unaccompanied by governmental agents. See e.g. the machinations of the informer set forth in United States v Costner, 359 F.2d 969, 972 (6th Cir. 1966).

Merely focusing attention on what transpired at the time of the transactions charged in the indictment as has been done so often by trial and appellate courts, represents a myopic view of the manner in which "street reality" occurs. As Chief Justice Warren noted in his concurring opinion in Lopez v United States, 373 U.S. 427, 446 n.2 (1963):

Where the similar defense of entrapment has been involved, cross-examination of the government informer has invariably been critical to the defense. See Sherman v United States, 356 U.S. 369, 371-375, 78 S.Ct. 819, 820-822. Had the Government been able to limit its case in Sherman to recordings of the final meetings between the informer and the Petitioner wherein the illegal sales were consummated, the record would never have revealed the long series of meetings inducing the Petitioner to make these sales. (Emphasis supplied).

Chief Justice Warren recognized that perhaps the most crucial evidence for the defense - in an entrapment case - is what occurred prior to the events charged in the indictment. Indeed the Sixth Circuit in Bryant, supra, implicitly, if not explicitly, recognized that the government's knowledge of improprieties by an informant prior to sales per se could arise and that if so the government had a duty to call the informer as a witness, Bryant,

supra, at 916.

Here it is quite obvious why the government adamantly refused to call Mays. His testimony was overwhelmingly favorable to Petitioner.* The government did not wish to have this damning testimony come from the mouth of its own witness. Better it should come from a defense witness who could be ruthlessly cross-examined on all matters under the sun and in other ways subtley tied by implication, to Petitioner as the "defendant's man".

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* It should be noted that Mays and Petitioner would have had a nearly insuperable time concocting Mays' testimony as Mays had been in secretive, protective custody since shortly after the events charged in the indictment and before Petitioner was ever arrested. (F.M.Tr. 16, 19-20, 60-62).

While it is believed that the rule, which does not require the calling of an informer whose identity is disclosed prior to trial should be re-examined, this Court does not have to reach that issue. Under the exception to the general rule which was clearly enunciated in Bryant, supra, Petitioner was entitled to have the government call Mays. As the somewhat lengthy summary of Mays' testimony at the prior trial indicates, his testimony would tend to be exculpatory.

First, Mays admits threatening people as a normal way of doing business. He admits threatening Petitioner on one occasion and states it was possible that he threatened Peititioner prior to any narcotics dealings with him. Lastly, Mays admits putting Petitioner "in fear" (and a reasonable reading of his testimony would imply, keeping him "in fear" throughout their brief relationship).

His motivation for making a case - any case - against Petitioner was dismissal of charges pending against him and greed, the hope of monetary reward. Mays was paid almost $4.000 to assist the government, of which approximately $300 came from work on this case.

Most importantly Mays was a participant in the transactions. He forced, or in his words, "demanded" or "told", Petitioner to give him some narcotics and money in connection with the September transaction and some money in connection with the October transaction. In bluntly put words, Mays extorted money and drugs from Petitioner - illegal acts. In other words, Mays possessed narcotics - an illegal act.

This testimony viewed favorably to the government displays an informant who cared

little for the refinements of the law and was out to obtain all he could get for himself -- leniency, fees from the government, money and drugs extracted by pressure from Petitioner.

Such conduct, admitted by the informant in open court, should surely have given some pause to government officials.*

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* See e.g. the reasons for voluntary dismissal of charges against two defendants when the government became apprised of the improper activities of informer French -- whose activities also played a part in the Ramsey case, discussed, supra. United States v Costner, 359 F.2d 969, 972 (6th Cir. 1966). It is submitted that such conduct -- which concededly governmental officials knew nothing about prior to commencement of the second trial -- is beyond the pale of conduct sanctionable by the courts. Government counsel should have entered a voluntary dismissal of the charges.

There was absolutely no justification for refusing to place this informant, Mays, on the stand. The government knew what Mays' testimony had been and could be expected to be. The government knew Petitioner's principal defense was entrapment based upon threats and coercion by Mays. This was not a case where Petitioner was "fishing" at the time of trial. This was not a case where Petitioner was hoping "something would develop" which would help him. Both government counsel and the trial court had heard Mays' testimony. They could not have failed to understand its import; its impact could not have been lost on reasonably intelligent men.

The government would argue that Mays was produced for trial, although not as a government witness, and thus defense counsel could have called Mays as a defense witness as he had done at the second trial.

Such a bootstrap argument is devoid of merit. As Chief Justice Warren aptly observed in Lopez, supra, at 445-446, merely allowing the defense to call such an informer as a witness, even as a hostile witness, is insufficient. First, he is associated in the jury's mind as the "defendant's man" with all of the implications that creates. The witness is open to impeachment on collateral matters. Deprivation of the ability to cross-examine "may be used to conceal substantial factual and legal issues concerning the rights of the accused and the administration of criminal justice," Id. at 446. See also the Chief Justice's additional cogent discussion of the role cross-examination of the informer plays in defense strategy. Id. at 444-445.

Counsel for Petitioner did not call Mays at the third trial even though he was

available and would have given the same testimony as at the prior trial. Counsel believed justified in relying upon the clear holding in Bryant, supra. This strategy, despite the favorable substance of the testimony, was furthered by the impressions left by Mays with the jurors at the second trial. Counsel for Petitioner and counsel for Respondent were informed by several jurors that they believed that, in substance, Mays and Petitioner, who had both been defense witnesses, were "in it together". Thus Mays was viewed as the "defense's man" - precisely the result warned against by Chief Justice Warren.

It does not require a Ph.D. in psychology to ascertain that the same testimony from the mouth of the same witness may be viewed differently by a jury depending upon which side calls him.

We submit it is indefensible and reprehensible for the government to utilize a person such as Mays to "make the case", then act and pretend he doesn't exist when it comes time to prosecute one of his "victims" - despite the informant's admitted infractions of state and federal laws in "making the case".

Is it fair for the government to attempt to hide the illegal actions of an informant by not calling him as a witness?

Has due process been afforded Petitioner when the government knowingly withholds from the jury - in the case in chief - evidence which tends to exculpate Petitioner?

We submit the answer to both querries is "No".

Under such circumstances, the government's burden was and is clear. It must call

a witness whose testimony would be exculpatory. United States v Bryant, 461 F.2d 912, 916 (6th Cir. 1972). See also United States v Walton, 411 F.2d 283, 287-289 (9th Cir. 1969); Little v United States, 490 F.2d 686, 686-687 (8th Cir. 1974); United States v Williams, 488 F.2d 788, 790 (10th Cir. 1973) each of which opined, albeit somewhat obliquely, that where an informant's testimony would be exculpatory or constitute material evidence under the rationale of Brady v Maryland, 373 U.S. 83 (1968), the government would have to produce the informant as a witness in order to comply with the demands of due process. See also United States v Clarke, 220 F.Supp. 905, 908 (E.D. Pa. 1963) wherein Judge Kraft noted, in granting a new trial because of the government's failure simply to produce an informant, that

if he had been available in court, that he "might well have ordered the Government to call him, as would have been our right. 23 C.J.S. Criminal Law Sec. 1017, p. 1097." Compare United States v Curry, 284 F.Supp. 458, 468-470 (N.D.Ill. 1968) in which Clarke, supra, and Ramsey, supra, were quoted with approval in granting a motion for judgment of acquittal because of failure to produce an informant coupled with delay in bringing the case, thereby causing the testimony of the informer to be lost.

Here Petitioner did all that was possible to try and have Mays called as a government witness. Compare United States v Fancutt, 491 F.2d 312, 314 (10th Cir. 1974). Here, unlike in Little v United States, 490 F.2d 686, 686-687 (8th Cir. 1974), the government did possess material information which it withheld from the jury and that testimony

would have clearly been helpful to the defense and "impeached the credibility of the government's case". Here as in United States v White, 324 F.2d 814, 816 (2nd Cir. 1963), the informant's testimony "might have tipped the scales in" Petitioner's favor.

This, then, is an appropriate case (United States v Williams, 488 F.2d 788, 790 (10th Cir. 1973)), a case in which "circumstances require" (United States v Craig, 477 F.2d 129, 131 (6th Cir. 1973)), that the government be ordered to call informer Mays as a witness.

CONCLUSION

For the reasons stated, it is requested that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Dated: August 12, 1975 Respectfully submitted,

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J. THOMAS CARROLL, JR.
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48740
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NO. 75-1080

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

JUN 30 1975

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA :

Plaintiff-Appellee :

v. :

GUS JOHN SKARTSIVAS :

Defendant-Appellant :

ORDER

- - - - - - - - - -

Before: WEICK, EDWARDS and PECK, Circuit Judges.

The Court having concluded, on the record on appeal and on the briefs and oral arguments of counsel for the parties, that defendant-appellant did not establish the defense of entrapment, that this Court's opinion in United States v. Bryant, 461 F.2d 912 (1972), did not require the calling of an informant by the plaintiff-appellee as its witness, and that the receipt in evidence of an admission of the appellant against his interests was not error,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By Grace Keller
Grace Keller
Chief Deputy

EXHIBIT A

July 21, 1975

Mr. James P. Hehman
Clerk
United States Court of Appeals
Sixth Circuit
Federal Building
Cincinatti, Ohio 45202

Re: U.S.A. v Shartsiyas No. 75-1080

Dear Sir:

Please transmit and certify the record in the above captioned case to the Clerk of the United States Supreme Court at your earliest convenience. Thank you for your consideration of this matter.

Very Truly Yours,

J. Thomas Carroll, Jr.

JTC:mg

EXHIBIT B

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
DEC 3 1975
MICHAEL RODAK, JR., CLERK

No. 75-370

In the Supreme Court of the United States

OCTOBER TERM, 1975

GUS JOHN SKARTSIVAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-370

GUS JOHN SKARTSIVAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was entrapped as a matter of law and that the government should have been required to call an informant as a prosecution witness, even though the informant was available to the defense.

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of two counts of having distributed heroin, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to concurrent terms of five years' imprisonment and a special parole term of three years. The court of appeals affirmed without opinion (Pet. App. A 1).

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[1]This was petitioner's third trial. Initially he pled guilty to count one of the indictment, but the district court permitted him to withdraw the plea upon his assertion that he could produce a witness who would testify that he was coerced into selling heroin. Thereafter, in February 1974, petitioner was tried before a jury and convicted on both counts. That conviction was vacated in May 1974 on the ground of ineffective assistance of counsel. A second trial in June 1974 ended in jury disagreement.

In early September 1972 in Detroit, Michigan, Agent Frank Catalogna of the Drug Enforcement Administration ("DEA") began investigating petitioner on the basis of information furnished by Frankie Mays, a paid informant (Tr. 10, 86, 109-111, 144-147). Agent Catalogna instructed Mays to tell petitioner that he knew of a prospective purchaser of narcotics (Tr. 11, 110). On the morning of September 26, 1972, DEA Agent Melvin Smith, who was to pose as the buyer, drove to Mays' home to arrange to purchase heroin from petitioner (Tr. 10-12, 88).

At about 1:00 p.m., Mays engaged in a telephone conversation in Smith's presence during which he asked the other party to sell one ounce of heroin. Mays agreed to pay $1,000 for the heroin and to meet the other person at 1:30 p.m. on the corner of Wyoming and Six Mile Streets in Detroit (Tr. 12-14). Smith and Mays drove to the meeting place and met petitioner, who sold Agent Smith a quantity of heroin for $1,000 (Tr. 14, 16-17, 88-89).

Petitioner noticed that Agent Smith had more money remaining and offered to sell an additional quantity of heroin which petitioner said was to have been the subject of another transaction which had fallen through. Agent Smith then purchased that quantity of heroin for $200. Petitioner also told Smith that he could arrange future heroin transactions (Tr. 17-18, 20-21, 84).

On October 4, 1972, Agent Smith telephoned petitioner and said that he wished to buy some heroin immediately (Tr. 67; Tapes 1-2).[2] Shortly thereafter petitioner called

[2]"Tapes" refer to the verbatim transcript of the telephone conversations between Agent Smith and petitioner on October 4, 1972, which were recorded.

Smith back and inquired how much heroin Smith wanted. Smith said one ounce, but petitioner urged him to buy two, and Agent Smith agreed to the larger amount (Tr. 29-32, 36; Tapes 1-3). Petitioner telephoned Smith three subsequent times that afternoon; during those conversations petitioner and Agent Smith agreed on the purchase price and the time and place of the transaction; they also agreed that the quality of the heroin would be better than that sold by petitioner to Smith on September 26 (Tr. 35-38; Tapes 4-6).

Following those conversations, Smith met petitioner at the corner of Wyoming and Six Mile Streets and completed the transaction (Tr. 39-40). Smith asked petitioner to name his supplier, but petitioner declined to provide this information on the ground that it would deprive him of his status as middleman (Tr. 41). Petitioner told Agent Smith to call him if he wanted to buy more narcotics (Tr. 41). Petitioner was subsequently arrested.

1. Petitioner's contention that he was entrapped is unfounded since, as the record demonstrates, petitioner was predisposed to sell heroin on both occasions just recounted. See *United States* v. *Russell*, 411 U.S. 423, 433.

Petitioner proposes, however, that this Court adopt a new rule[3] in entrapment cases requiring the government to

[3]Contrary to petitioner's assertion (Pet. 14-15), no circuit now follows such a rule. *Henderson* v. *United States*, 261 F.2d 909 (C.A. 5), suggested simply that entrapment as a matter of law was proved by the government's evidence alone, even without defendant's testimony; nothing whatever was said about a "reasonable suspicion" test. That such a test is not followed in the Ninth Circuit is shown by *Young* v. *United States*, 286 F.2d 13, 15, certiorari denied, 366 U.S. 970. Nor does the Sixth Circuit have such a rule, see *United States* v. *Ambrose*, 483 F.2d 742, 752. *Morei* v. *United States*, 127 F.2d 827 (C.A. 6), relied upon by petitioner, held that entrapment was no defense if the criminal plan originated with the

prove that prior to affording the defendant an opportunity to commit a crime it had a "reasonable suspicion" that he would do so. Such a rule is unwarranted, since it would add nothing to the ability of the "otherwise innocent" (*Sorrells* v. *United States,* 287 U.S. 435, 448) to demonstrate their lack of predisposition, but would, rather, focus on the conduct of the government, which this Court has held is not the intended purpose of the entrapment defense. *United States* v. *Russell, supra,* 411 U.S. at 435. See *United States* v. *Williams,* 487 F.2d 210, 211, n.1 (C.A. 9), certiorari denied, 416 U.S. 958.

2. At both of petitioner's previous trials in this case he had called the informant Mays to testify on his behalf. At this trial he requested the district court to instruct the government to call Mays as a prosecution witness. The district court refused to do so (Tr. 141), whereupon petitioner elected not to call Mays and rested his defense.

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defendant *or* if the government agents had a reasonable suspicion that the defendant was engaged or about to be engaged in crime (127 F.2d at 833). *Morales* v. *United States,* 260 F.2d 939 (C.A. 6), simply took the defendant's prior lack of criminal conduct into account in determining that entrapment as a matter of law had been made out.

Neither *United States* v. *Fox,* 437 F.2d 733 (C.A. 7), certiorari denied *sub nom. Gill* v. *United States,* 402 U.S. 1011, nor *Lunsford* v. *United States,* 200 F.2d 237 (C.A. 10), holds that the government's failure to prove the existence of a "reasonable suspicion" is fatal when the entrapment defense is asserted. Rather, that issue was not raised in those cases, which hold only that the entrapment offense could not be successfully raised where the officers had reasonable suspicion to believe that the defendant might commit an offense.

Petitioner claims that Mays' testimony would have been exculpatory as to him and that therefore it was error for the district court not to order the government to call Mays as a government witness. But the government is under no obligation to call an informant as a witness, especially where, as here, the informant's testimony is not needed to prove an essential element of the government's case. See, *e.g., United States* v. *Tatum,* 496 F.2d 1282, 1284 (C.A. 5); *United States* v. *Craig,* 477 F.2d 129, 131 (C.A. 6). Petitioner knew that Mays was available to testify and what his testimony was likely to be; if he wished the jury to hear Mays' testimony he should have called him as his own witness. See *United States* v. *Key,* 371 F.2d 421, 423 (C.A. 6), certiorari denied, 386 U.S. 982; *Cohen* v. *United States,* 363 F.2d 321, 328 (C.A. 5), certiorari denied, 385 U.S. 957; *United States* v. *Miguel,* 340 F.2d 812, 815 (C.A. 2), certiorari denied, 382 U.S. 859; *Cenedella* v. *United States,* 224 F.2d 778, 783 (C.A. 1), certiorari denied, 350 U.S. 901.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[4]As the court of appeals noted (Pet. App. A 1), petitioner's reliance on *United States* v. *Bryant,* 461 F.2d 912 (C.A. 6), is misplaced. *Bryant* requires than an informant be called as a prosecution witness only where the government had suppressed evidence potentially favorable to the accused. 461 F.2d at 916. No such claim of suppression is made in this case.

DOJ-1975-12